

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's representative contends that OWCP should accept additional conditions due to her December 28, 2007 employment injury and that her January 7, 2008 recurrence claim is compensable under FECA.

FACTUAL HISTORY

On December 28, 2007 appellant, then a 22-year-old part-time nurse, filed a traumatic injury claim alleging that she sustained injuries to her head, wrist, elbow, hand and knee on that day when she slipped on a wet floor. OWCP accepted the claim for closed fracture of the sacrum and coccyx without injury to the spinal cord. Appellant returned to full-duty work on January 5, 2008 and stopped work on January 7, 2008.

On January 25 and February 7, 2008 OWCP received an undated attending physician's report (Form CA-20) from Dr. Leslie Dreifus, a treating chiropractor, who diagnosed sacral fracture and lumbar radiculitis and checked "yes" that the conditions were due to the December 28, 2007 employment injury. Dr. Dreifus indicated that appellant was totally disabled for the period December 28, 2007 through March 1, 2008.

On February 25, 2008 appellant filed a claim for a recurrence of disability beginning January 7, 2008.

In a letter dated March 10, 2008, OWCP advised appellant as to the evidence required to support her claim for a recurrence of disability.

Subsequently OWCP received a March 7, 2008 work capacity evaluation (Form OWCP-5c) from Dr. Philip D.P. Abessinio, a treating chiropractor, who found her totally disabled from work. In a February 23, 2008 report, Dr. Jagga Rao Alluri, a treating Board-certified neurologist, noted that appellant sustained a back injury at work and that she continued to have lower back pain. Dr. Alluri's diagnosis was to rule out right lumbar radiculopathy.

In a February 27, 2008 report, Dr. Dorothy Norwood, an examining physician, noted that appellant had been out of work since her December 28, 2007 employment injury. She reported that appellant was attending classes and driving. Dr. Norwood related that an initial x-ray interpretation stated that a hairline fracture of the sacrum could not be ruled out and that a computerized tomography (CT) scan of the sacrum found no evidence of an abnormal dysraphism or fracture. In concluding, she opined that appellant's back pain could not be attributed to her employment injury as there was no sacral fracture. Dr. Norwood noted that the findings of the sacral area were congenital "and at most the fall exacerbated these findings."

In a March 13, 2008 report, Dr. Dev J. Berkowitz, an examining physician, related that appellant sustained an employment injury on December 28, 2007 when she slipped and fell on a wet floor. Appellant was seen for her continuing complaints of lower back pain radiating into her right leg. Review of an x-ray interpretation revealed a S4 hairline fracture. Dr. Berkowitz noted a CT scan was negative for a sacrum fracture and that a lumbar magnetic resonance scan (MRI) was negative for a disc herniation.

On April 18, 2008 OWCP received an undated report from Dr. Dreifus who noted that appellant was seen on January 16, 2008 for employment injuries sustained on December 28,

2007 as a result of slipping and falling on a wet floor. She reported a sacral fracture based on an x-ray interpretation. Diagnoses included sacral fracture, sciatic neuritis, lumbar radiculitis, lumbar facet syndrome and L5 subluxation. Dr. Dreifus indicated that until appellant's sacral fracture healed she was unable to work.

By decision dated May 22, 2008, OWCP denied appellant's recurrence claim beginning January 7, 2008 finding that the medical evidence of record failed to establish a causal relationship between the alleged disability and the December 28, 2007 employment injury.²

OWCP received additional medical and diagnostic reports. In a February 5, 2008 report, Dr. Abessinio diagnosed sciatic neuritis, lumbar intervertebral disc syndrome and S4 transverse sacral fracture as a result of her work injury. He concluded that appellant was currently totally disabled as a result of these employment related injuries.

In May 14, 2009 letter, counsel requested reconsideration of the denial of her January 7, 2008 recurrence claim. He contended that OWCP erred in failing to expand her claim to include all the diagnosed conditions sustained as a result of her December 28, 2007 employment injury. Counsel also contended that appellant's January 7, 2008 recurrence was compensable as it occurred within 90 days of her employment injury. In support of her claim, appellant submitted a received a February 5, 2008 report and x-ray examination report from Dr. Abessinio.

Dr. Abessinio reported seeing appellant on that date for treatment of multiple spinal injuries sustained as a result of her December 28, 2007 employment injury. He provided physical findings and noted that he had reviewed x-ray interpretations and an MRI scan. Dr. Abessinio concluded that appellant was totally disabled from working at this point and recommended chiropractic treatment. In the February 5, 2008 x-ray examination report, he diagnosed T9, right L2, T10, T11 and left L3 rotation malpositions, mild L5-S1 decreased disc spacing, nonfusion of S1-L5, increased psoas shadows on left noted and right A1 sacrum.

By decision dated August 13, 2009, OWCP modified the prior decision to find the medical evidence insufficient to establish that appellant was disabled from performing her duties due to her accepted employment injury. It denied expanding her claim for any additional conditions.

On August 6, 2010 counsel requested reconsideration. Appellant contended that OWCP erred in failing to expand her claim to include additional conditions and that it should have accepted her recurrence claim as it had occurred within 90 days of her accepted employment injury.

By decision dated August 30, 2010, OWCP denied reconsideration.

² On April 21, 2009 OWCP accepted her claim for a recurrence of disability beginning October 11, 2008.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

In an August 13, 2009 decision, OWCP found counsel was correct in his argument that OWCP erred in focusing on causal relationship when it denied her claim for a recurrence of disability occurring within 90 days of her accepted employment injury. It found the evidence was insufficient to support her recurrence claim, as the medical evidence was insufficient to establish that she was disabled from performing her duties due to her accepted employment injury. On August 30, 2010 OWCP denied merit review of its prior decisions denying her recurrence claim beginning January 7, 2008.

As noted, the Board does not have jurisdiction over the merits of this case. The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) requiring OWCP to reopen the case for review of the merits of the claim. The Board finds that appellant did not raise any new argument that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered.

On appeal counsel reiterated that OWCP failed to accept additional conditions and that appellant's January 7, 2008 recurrence was compensable as it occurred within 90 days of her employment injury. Appellant's arguments however, were previously considered by OWCP in its August 13, 2009 decision. In fact, OWCP modified the denial of her recurrence claim when it found her argument that burden of proof for a recurrence of disability within 90 days of an accepted employment injury is different than that occurring after 90 days. In its August 13, 2009 decision, OWCP specifically found that it had erred in focusing on the issue of causal relationship when the issue should have been whether the evidence established disability due to

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁵ 20 C.F.R. § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

⁶ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

the accepted employment injury. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁷ As such, appellant's contention is insufficient to warrant further merit review of her claim.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Further, she failed to submit relevant and pertinent new evidence not previously considered by OWCP. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁷ *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁸ *See James E. Norris*, 52 ECAB 93 (2000).